

<p>1 UNITED STATES DISTRICT COURT 2 DISTRICT OF NEW JERSEY 3 CIVIL ACTION CASE NO. 2:08-CV-1567</p> <p>4 DR. FADI CHAABAN; DR. SABINO R. TORRE, DR. 5 CONSTANTINOS A. COSTEAS and DR. ANTHONY J. 6 CASELLA, as Trustee of Diagnostic & Clinical: 7 Cardiology, P.A Profit Sharing Plan, 8 Plaintiffs, 9 10 vs. 11 DR. MARIO A. CRISCITO, 12 Defendant. 13 14 Tuesday, June 16, 2009</p> <p>15 Deposition of BRIAN WARNOCK, VOLUME I, before 16 Nancy A. Miani, a Certified Court Reporter, License 17 No. XI00814, and a Notary Public of the State of New 18 Jersey at the offices of WITMAN, STADTMAUER, ESQS, 26 19 Columbia Turnpike, Florham Park, New Jersey, on 20 Tuesday, June 16, 2009, at 10 a.m.</p> <p>21 MIANI COURT REPORTING 22 CERTIFIED COURT REPORTERS 23 1741 DANIEL COURT 24 WALL, NJ 07719 25 (732) 681-4776</p>	<p>1 <u>I N D E X</u> 2 WITNESS DIRECT CROSS REDIRECT RECROSS 3 BRIAN WARNOCK 4 BY MR. CHARME 6 5 BY MR. KERN 114 6</p> <p>7 <u>E X H I B I T S</u> 8 EXHIBIT NO. DESCRIPTION PAGE</p> <p>9 Warnock-1 Loan Amortization Schedule, 28 Four Pages</p> <p>10 Warnock-2 Nine Page Document from 30 11 American Pension Corporation 12 Entitled "Money Purchase Retirement Plan"</p> <p>13 Warnock-3 Seven Pages of Handwritten 33 Notes</p> <p>14 Warnock-4 Three Pages of Handwritten 39 15 Notes</p> <p>16 Warnock-5 Two Pages of Handwritten Notes 45</p> <p>17 Warnock-6 One-Page Handwritten Letter with 50 18 Attached Typewritten Letter to 19 Dr. Criscito dated 1/7/91 from Brian Warnock</p> <p>20 Warnock-7 Form 5500 for 1999, 18 Pages 54</p> <p>21 Warnock-8 Form 5500 for 2000, 12 Pages 56</p> <p>22 Warnock-9 One Pages of Handwritten Notes 57 23 With Attached Three Pages of Typewritten Notes</p> <p>24 Warnock-10 Two Pages of Typewritten Notes 63</p> <p>25 Warnock-11 Two Pages Reconciliation of 69 Trust Assets for 1999</p>
<p>1 A P P E A R A N C E S : 2 3 WITMAN, STADTMAUER, ESQS. 4 26 Columbia Turnpike 5 Florham Park, NJ 07932 6 By: STEPHEN M. CHARME, ESQ. 7 Attorneys for the Plaintiffs</p> <p>8 KERN, AUGUSTINE, CONROY & SCHOPPMANN, P.C. 9 1120 Route 22 East 10 Bridgewater, NJ 08807 11 BY: STEVEN KERN, ESQ. 12 AND CHARLES H. NEWMAN, ESQ. 13 Attorneys for the Defendant</p> <p>14 ALSO PRESENT: 15 16 Anthony Casella, M.D.</p>	<p>1 <u>E X H I B I T S</u> 2 EXHIBIT NO. DESCRIPTION PAGE</p> <p>3 Warnock-12 Reconciliation of Trust 71 Assets for 2005, One Page</p> <p>4 Warnock-13 Form 1096 for 2005, Two 75 5 Pages</p> <p>6 Warnock-14 Form 5498 for 2006, One 76 7 Page</p> <p>8 Warnock-15 Copy of Savings Withdrawal 76 9 Slip, One Page</p> <p>10 Warnock-16 Seven Pages of Handwritten 79 Notes</p> <p>11 Warnock-17 Memo from Brian Warnock 90 12 Dated 9/14/07 with Two Page Attachment</p> <p>13 Warnock-18 Two-Page Letter to Anthony 101 14 Casella, M.D., from Brian Warnock dated August 28, 2007</p> <p>15 Warnock-19 One-Page E-mail from Marysue 104 McCarthy dated 7/28/06</p> <p>16 Warnock-20 Two-Page Letter to Joy M. 107 17 Mercer, Esq. From Brian Warnock dated 11/13/07</p> <p>18 Warnock-21 Three-Page Letter to Joy M. 108 19 Mercer, Esq., from Brian Warnock dated 12/6/07</p>

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LITIGATION SUPPORT

DIRECTION NOT TO ANSWER

(None)

MOTION TO STRIKE

(None)

DOCUMENT REQUEST

(None)

EXHIBIT ANALYSIS

Original Exhibits Attached to Original Transcript.

Copies of All Exhibits attached to All Transcripts.

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BRIAN WARNOCK,

American Pension Corporation, 1375 Plainfield Avenue,
Watchung, New Jersey, sworn.

DIRECT EXAMINATION BY MR. CHARME:

Q. Good morning, Mr. Warnock. My name is
Stephen Charmé. I represent the plaintiffs in the
lawsuit in which you were subpoenaed.

Are you represented by counsel today?

A. No.

Q. Okay. Are you aware that you have a
right to be represented by counsel?

A. Yeah.

Q. You've chosen --

A. I didn't --

Q. So you've chosen not to be represented by
counsel. Is that correct?

A. That's correct.

Q. Okay. Have you ever had your deposition
taken before?

A. Yes.

Q. How recently was the last time?

A. Maybe 2 or 3 years ago.

Q. What kind of case?

A. About 2 or 3 years ago. It was a case
involving work.

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Q. Okay. Let me just give you some
instructions then.

A. Sure.

Q. I'm going to be asking you questions,
your answers are going to be recorded. If I ask you
something and you don't understand the question,
please tell me and I will do my best to clarify it for
you. Do you understand that?

A. Uh-hum.

Q. If you understand the question, I would
appreciate if you would give me a complete and honest
answer to it. Do you understand that?

A. Yes.

Q. If at some point you feel you need to
take a break, please tell me and I will try to
accommodate you. Do you understand that?

A. Yes.

Q. I have to ask you the last question.

Are you taking any kind of medicine or do
you have any kind of physical condition that would
stop you from understanding my questions and giving me
complete and honest answers?

A. No.

Q. Okay. Could you tell me your educational
background, if any, beyond high school.

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A. I have a degree in sociology from
Montclair State College.

Q. Is that a BA?

A. I guess a Bachelor of Science, actually.
Social sciences.

Q. And what year did you get that?

A. 1976.

Q. Okay. Could you state your date of
birth, please.

A. April 6th, 1954.

Q. Besides the bachelor's degree from
Montclair -- was it Montclair State?

A. Yes.

Q. Have you taken any other advanced
courses?

A. No.

Q. Would you tell me your employment
background starting when you graduated from college,
please.A. I worked for Mutual Benefit Life
Insurance Company in their Pension Department for two
and a half years. Then I worked in Bankers National
Life Insurance Company.Q. So it's two and a half years, say, to
what, 1979?

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1 A. To 1979, yeah.
 2 Q. Okay. I'm sorry. What was the next one?
 3 A. Bankers National Life Insurance Company.
 4 Q. What did you do there?
 A. Again, in the Pension Department. The
 6 ERISA Unit.
 7 Q. Is that what it was called?
 8 A. Yeah.
 9 Q. How long did you work there?
 10 A. Well, until 1981.
 11 Q. Okay.
 12 A. And then the present occupation, American
 13 Pension Corporation.
 14 Q. So you joined -- I'm going to call them
 15 APC. Is that okay?
 16 A. Yes.
 17 Q. You joined APC in 1981?
 18 A. That's correct.
 19 Q. Let's go back to Mutual Benefit Life
 20 Insurance. Did you have any job title there?
 21 A. Reporting and disclosure technician,
 22 actually.
 23 Q. What did your job consist of while you
 24 were there?
 25 A. We prepared documents for pension plans,

10

1 ERISA documents. And the 5500 forms.
 2 Q. Okay.
 3 A. Which is the annual report you file for a
 4 pension plan.
 5 Q. When you say -- who do you file that
 6 annual report with?
 7 A. It's the IRS and Department of Labor.
 8 Q. So you worked on preparing Form 5500's
 9 while you were at Mutual Benefit Life?
 10 A. Yes.
 11 Q. Okay. Why did you leave that company?
 12 A. I guess more money.
 13 Q. Good. Okay. What did you do when you
 14 went to Bankers National Life?
 15 A. I was the head of the Keogh Unit.
 16 Q. Head of the Keogh Unit?
 17 A. ERISA Department slash Keogh, and they
 18 had a number of Keogh plans, which is a pension plan
 19 for self-employed individuals, and we did not do 5500
 20 forms there. But it was mostly involved with
 21 annuities, maintaining the annuities, which we used to
 22 fund the plans.
 23 Q. Okay. How come you left there?
 24 A. More money.
 25 Q. Okay.

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1 A. I was young back then.
 2 Q. How did you come to know APC had a
 3 position available?
 4 A. A gentleman I worked with, named Ray
 5 Miller, worked with me at Mutual Benefit Life, and he
 6 had worked there, and he was leaving for another
 7 position.
 8 Q. He was leaving APC?
 9 A. He was leaving APC and he called me and I
 10 took his job, basically.
 11 Q. Okay. What was the job that you took?
 12 A. Administering pension plans.
 13 Q. And since you joined APC in 1981, have
 14 your job responsibilities changed at all?
 15 A. They've been increased.
 16 Q. Tell me how they've increased.
 17 A. Well, I'm the vice-president now. When I
 18 started there, it was the owner and me, a secretary
 19 and a part-timer, and now we have nine people. So
 20 there's a president, myself, and one, two -- three
 21 administrators, a part-time administrator.
 22 Q. Who is currently the president --
 23 A. And office staff. Peter Coughlan,
 24 C-O-U-G-H-L-A-N. And he owns the company.
 25 Q. And you're the vice-president?

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1 A. Yes.
 2 Q. And then you said there were three, what,
 3 administrators?
 4 A. Right.
 5 Q. Okay.
 6 A. Third party administrators we call them.
 7 Q. Who are they?
 8 A. Dominique Eck, Joyce Plesnarski, and
 9 Stuart Tankenbaum.
 10 Q. Are the other employees just clerical
 11 staff?
 12 A. Yes.
 13 Q. Okay. What -- first of all, how long has
 14 Dominique Eck been there?
 15 A. 20 years. 20 plus.
 16 Q. And what about Joyce?
 17 A. About seven.
 18 Q. And Stuart --
 19 A. Right around the same. I think it's
 20 eight and seven. Joyce would be eight, Stuart would
 21 be seven. I could be off.
 22 Q. Okay. Do you do -- when you went to APC,
 23 did you do Form 5500's again?
 24 A. Yes. But more involved than just the
 25 5500's. We would also prepare the annual reports,

<p style="text-align: right;">13</p> <p>1 participant statements.</p> <p>2 Q. Tell me if you would, please, what an</p> <p>3 annual report is.</p> <p>4 A. Annual report, you're basically doing</p> <p>5 reconciliation of the assets for the year. Very short</p> <p>6 one. It's not an audit.</p> <p>7 Q. Okay.</p> <p>8 A. And then we would prepare a report</p> <p>9 allocating -- we would calculate the contribution, and</p> <p>10 the report would then allocate the contribution, the</p> <p>11 proportionate share of the plan earnings or losses.</p> <p>12 Q. The annual report would do that?</p> <p>13 A. It's the annual report, and out of the</p> <p>14 annual report, the participant statements would come.</p> <p>15 Q. Okay. From whom do you get the</p> <p>16 information to prepare annual reports?</p> <p>17 A. We get it from the client.</p> <p>18 Q. Now, you say it's not an audit.</p> <p>19 A. It's not an audit, no.</p> <p>20 Q. Do you verify the information you get</p> <p>21 from the client?</p> <p>22 A. Not necessarily. We ask them, we send a</p> <p>23 questionnaire, we say give us the information.</p> <p>24 There's a questionnaire for them to fill it out, we</p> <p>25 ask them to provide backup, copies of the brokerage</p>	<p style="text-align: right;">15</p> <p>1 fill it out, then that's enough. You know, we don't</p> <p>2 insist on the backup.</p> <p>3 Q. Okay.</p> <p>4 A. I should just add that a lot of</p> <p>5 companies, they have the brokerage statements sent to</p> <p>6 us automatically so we just receive them.</p> <p>7 Q. So you've worked on the annual report,</p> <p>8 which includes participant statements, the Form</p> <p>9 5500's?</p> <p>10 A. Right.</p> <p>11 Q. What else?</p> <p>12 A. We prepare plan documents. On defined</p> <p>13 benefit plans it's a little bit different. There's an</p> <p>14 actuarial report that you have to prepare.</p> <p>15 Q. Anything else that you do there?</p> <p>16 A. We provide the forms for termination</p> <p>17 claims. If somebody terminates employment, we would</p> <p>18 give them the forms. The employee completes the forms</p> <p>19 saying what they want done with their money, whether</p> <p>20 they want it rolled over, they want it in cash, taxes</p> <p>21 withheld, that kind of thing.</p> <p>22 Q. I think earlier when you were talking</p> <p>23 about Dominique, Joyce, and Stuart, you told me they</p> <p>24 were third party administrators.</p> <p>25 A. Right.</p>
<p style="text-align: right;">14</p> <p>1 statements. Sometimes they do, sometimes they don't.</p> <p>2 We don't, you know, insist on it.</p> <p>3 Q. So if they don't provide copies of the</p> <p>4 brokerage statements as backup, you don't insist on</p> <p>5 that?</p> <p>6 A. No.</p> <p>7 Q. And based on your experience, are you</p> <p>8 able to say, you know, what percentage of clients do</p> <p>9 provide you with brokerage statements as backup versus</p> <p>10 what percentage don't?</p> <p>11 A. I'd say more do. Probably 75, 80 percent</p> <p>12 do.</p> <p>13 Q. Do provide you with brokerage statements?</p> <p>14 A. Do provide that, yes.</p> <p>15 Q. Okay. Are you aware why the other, say,</p> <p>16 remaining 20 percent do not?</p> <p>17 A. No, usually it's just a time thing, that</p> <p>18 they're trying to get it done quickly and don't want</p> <p>19 to take the time to copy them.</p> <p>20 Q. Okay. And if they don't want to take the</p> <p>21 time to copy them, you don't ask them to send you</p> <p>22 those statements later on when they do have the time?</p> <p>23 A. No.</p> <p>24 Q. Okay.</p> <p>25 A. No. They provide the questionnaire, they</p>	<p style="text-align: right;">16</p> <p>1 Q. I thought APC, itself, was the third</p> <p>2 party administrator. Am I mistaken?</p> <p>3 A. Well, I mean, they have titles, but we</p> <p>4 call them pension consultants. There's no special</p> <p>5 significance to their title. I think one is called a</p> <p>6 consultant, one is an analyst.</p> <p>7 Q. Do you know what a third party</p> <p>8 administrator is for a pension plan?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. Tell me what your understanding of</p> <p>11 that is.</p> <p>12 A. Third party administrator would be --</p> <p>13 would assist the client, the plan trustees in</p> <p>14 preparing the reports. We don't have -- we are not</p> <p>15 trustees. We are not the plan administrators. So we</p> <p>16 are a little more than clerical, but we're basically</p> <p>17 doing the paperwork for the employer as the third</p> <p>18 party administrator.</p> <p>19 Q. Do you do work sometimes with the</p> <p>20 trustees of plans?</p> <p>21 A. On -- 99 percent of our plans the trustee</p> <p>22 is the owner of the company.</p> <p>23 Q. Have you heard of Diagnostic & Clinical</p> <p>24 Cardiology?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">17</p> <p>1 Q. When did you first hear of that company?</p> <p>2 A. We have been working on them, really</p> <p>3 since I started in -- started at American Pension</p> <p>4 Corporation.</p> <p>5 Q. You started there in 1981, correct?</p> <p>6 A. Yes.</p> <p>7 Q. At the time you started there, was</p> <p>8 Diagnostic & Clinical Cardiology already a client of</p> <p>9 APC?</p> <p>10 A. It was a client for, I believe, since</p> <p>11 1980. Right before I started.</p> <p>12 Q. Before you started, who was working on</p> <p>13 the account?</p> <p>14 A. Probably Ray Miller. I couldn't -- I</p> <p>15 would say I don't know.</p> <p>16 Q. When you joined APC in 1981, did you</p> <p>17 start doing work with Diagnostic & Clinical</p> <p>18 Cardiology?</p> <p>19 A. I don't recall specifically --</p> <p>20 Q. Okay.</p> <p>21 A. -- if I worked on that plan or not.</p> <p>22 Q. At some point after you joined, whether</p> <p>23 it was 1981, but at some point did you ever work on</p> <p>24 that plan?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">19</p> <p>1 that. That's an example. So then we would, everybody</p> <p>2 would just get a straight 15 percent. It was amended</p> <p>3 over the years to a profit sharing plan, and they call</p> <p>4 it a new comparability plan, where it's a</p> <p>5 discretionary contribution. So then we would work</p> <p>6 with, in this case, Dr. Casella, and he would give us</p> <p>7 the census, and basically tell us what he's looking</p> <p>8 for in terms of the contribution, which would be</p> <p>9 typically, if you want to maximize the doctors, we</p> <p>10 want to give the rest of the employees 5 percent.</p> <p>11 Q. Do you recall when it changed over to a</p> <p>12 profit sharing plan?</p> <p>13 A. Not -- no, I don't. No. I'd be</p> <p>14 guessing.</p> <p>15 Q. If I told you that it changed over</p> <p>16 sometime around 2005, would that refresh your</p> <p>17 recollection?</p> <p>18 A. No, I don't think that would be correct.</p> <p>19 Q. You don't think that would be correct?</p> <p>20 A. That would not be correct. Before then,</p> <p>21 certainly before 2005.</p> <p>22 Q. You think it changed over to a profit</p> <p>23 sharing plan before 2005?</p> <p>24 A. For sure, yes.</p> <p>25 Q. Do you think it changed over to a profit</p>
<p style="text-align: right;">18</p> <p>1 Q. Okay. When you worked on that plan, tell</p> <p>2 me what kinds of things you did.</p> <p>3 A. We would calculate the contributions for</p> <p>4 the employee census --</p> <p>5 Q. Let's start with that. Tell me what an</p> <p>6 employee census is, please.</p> <p>7 A. Employee census is a list of everybody</p> <p>8 working there, their names, dates of birth, dates of</p> <p>9 employment, dates of termination.</p> <p>10 Q. Okay. And why do you need that</p> <p>11 information?</p> <p>12 A. We need it to calculate the contribution.</p> <p>13 Q. Okay. Do you need any other information</p> <p>14 to calculate the contribution?</p> <p>15 A. No -- well, the plan document would have</p> <p>16 the formula. The formula for calculating the</p> <p>17 contribution is in the document.</p> <p>18 Q. You would need the compensation for the</p> <p>19 employees, right?</p> <p>20 A. Right, names, dates of birth, dates of</p> <p>21 employment, and their annual compensation.</p> <p>22 Q. And APC would do the calculations?</p> <p>23 A. We would do the calculation. Originally</p> <p>24 it was a money purchase plan, which had a fixed</p> <p>25 contribution, it was like 15 percent, something like</p>	<p style="text-align: right;">20</p> <p>1 sharing plan before 2000?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. But you don't remember the year?</p> <p>4 A. I don't remember the year, no.</p> <p>5 Q. You said -- I'm going to refer to</p> <p>6 Diagnostic & Clinical Cardiology as DCC for short.</p> <p>7 Okay?</p> <p>8 A. Yes.</p> <p>9 Q. You said you would get information to</p> <p>10 prepare an employee census, correct?</p> <p>11 A. We would send the census from the year</p> <p>12 before, generally from our computer, which has</p> <p>13 everybody that we know of from the year before, and</p> <p>14 then we would send it and they would fill out the</p> <p>15 census, basically just updating. It's already got the</p> <p>16 names, dates of birth, dates of employment. Then they</p> <p>17 would provide us with the current year's salary and</p> <p>18 any new people, any terminations.</p> <p>19 Q. Okay. Is there anyone at DCC who you --</p> <p>20 withdrawn.</p> <p>21 Were you, yourself, personally involved</p> <p>22 in preparing employee censuses for DCC as opposed to</p> <p>23 someone else in the office?</p> <p>24 A. When you say preparing the census, the</p> <p>25 census was completed by Diagnostic, not by us.</p>

<p style="text-align: right;">21</p> <p>1 Q. Let me say it differently.</p> <p>2 After you sent Diagnostic, you said the</p> <p>3 old census and asked them to update names, addresses,</p> <p>4 and compensation, correct?</p> <p>5 A. Right.</p> <p>6 Q. Is that something that you did?</p> <p>7 A. Did I mail it out?</p> <p>8 Q. Yes.</p> <p>9 A. No.</p> <p>10 Q. So was someone assigned to the DCC</p> <p>11 account to do that?</p> <p>12 A. Well, that would just be a clerical</p> <p>13 function, you know.</p> <p>14 Q. Okay. And when it came back, whose job</p> <p>15 was it to review the updated information?</p> <p>16 A. Primarily Dominique's. I may have done</p> <p>17 it. Sometime over the last, you know -- since 1981, I</p> <p>18 may have been involved with a year or something, but</p> <p>19 general Dominique was the one who did it.</p> <p>20 Q. If there were any questions about the</p> <p>21 information that was received, do you know who APC</p> <p>22 spoke to at DCC?</p> <p>23 A. Dr. Casella.</p> <p>24 Q. And that was in connection with the</p> <p>25 employee census?</p>	<p style="text-align: right;">23</p> <p>1 okay, and they would make the contribution to the</p> <p>2 plan.</p> <p>3 Q. Let me ask you a question. When you say</p> <p>4 he would receive it and say that's okay, did you ever</p> <p>5 speak to Dr. Casella personally about calculations of</p> <p>6 employee contributions?</p> <p>7 A. I'm sure I did. Yeah.</p> <p>8 Q. When you say you're sure you did, do you</p> <p>9 mean you can actually recall something, or you think</p> <p>10 you may have?</p> <p>11 MR. KERN: I'm going to object. You've</p> <p>12 already asked the question, he already answered it.</p> <p>13 He's your own witness.</p> <p>14 MR. CHARME: He's not my witness, he's a</p> <p>15 third party witness.</p> <p>16 You can answer.</p> <p>17 A. I don't recall any specific conversation</p> <p>18 with Dr. Casella about calculating the contribution.</p> <p>19 Q. Okay. Now, you said that was step one,</p> <p>20 getting the census back and calculating the</p> <p>21 contribution. What was the next step?</p> <p>22 A. The next step would be preparing the 5500</p> <p>23 forms, the participant statements. In this case,</p> <p>24 there was -- it was a little bit different because</p> <p>25 several -- five or six of the doctors had separate</p>
<p style="text-align: right;">22</p> <p>1 A. Yes.</p> <p>2 Q. What else did APC do for DCC?</p> <p>3 A. Okay. We would, once we received the</p> <p>4 census back, it was kind of a two step thing. First</p> <p>5 we would calculate the contribution. Okay. And the</p> <p>6 contribution, like I said, once it turned to a profit</p> <p>7 sharing plan especially, we would calculate it, give</p> <p>8 it to Dr. Casella, he would look at it and say, you</p> <p>9 know, yes, sounds okay, you know, because profit</p> <p>10 sharing is a discretionary contribution.</p> <p>11 Q. Let me understand. After you got the</p> <p>12 employee census back, you would calculate the</p> <p>13 contributions, and then the contributions that had</p> <p>14 been calculated would be sent to Dr. Casella for his</p> <p>15 review?</p> <p>16 A. Right.</p> <p>17 Q. And who did that?</p> <p>18 A. Dominique.</p> <p>19 Q. Okay.</p> <p>20 A. Okay. Then.</p> <p>21 MR. KERN: Is Dominique a woman or a man?</p> <p>22 THE WITNESS: A female.</p> <p>23 MR. KERN: So it's D-O-M-I-N-I-Q-U-E?</p> <p>24 THE WITNESS: Yes, Eck, E-C-K.</p> <p>25 A. And Dr. Casella would see it, say that's</p>	<p style="text-align: right;">24</p> <p>1 accounts where they had their own investments, and</p> <p>2 then they would -- they would provide us the</p> <p>3 information on their own personal account, how they</p> <p>4 invested the money. The participants -- and this</p> <p>5 changed. Okay. Eventually it changed where the</p> <p>6 participants all have a separate brokerage account.</p> <p>7 Prior to that, the participants, their assets were in</p> <p>8 one commingled account with several of the doctors,</p> <p>9 which would be the newer ones, the other participants</p> <p>10 and Mario Criscito, so we did --</p> <p>11 Q. Let me just stop you for a minute so we</p> <p>12 can clarify some things.</p> <p>13 A. Sure.</p> <p>14 Q. When you joined APC in 1981, were you</p> <p>15 personally involved in preparing the Form 5500 for</p> <p>16 DCC?</p> <p>17 A. I don't recall if I ever did it. I</p> <p>18 probably did at some point in time as people, you</p> <p>19 know, staff changed and everything, you know.</p> <p>20 Q. Do you recall when you, you, personally,</p> <p>21 first got involved in preparing a Form 5500 for DCC?</p> <p>22 I don't mean doing actually typing, I mean just</p> <p>23 gathering information.</p> <p>24 A. I don't recall that I ever actually did</p> <p>25 the full annual report on Diagnostic. I would have</p>

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1 APC had in its files the year end statement from
2 Morgan Stanley for the year 1999, correct?
3 A. Year end statement of 1999. No, that is
4 not correct.

(There is a discussion off the record.)

6 Q. Did you have any statements for the year
7 2000 prior to the filing of this Form 5500?

8 A. Yes, we did. They didn't realize they
9 were in the file.

10 Q. What did you have?

11 A. We had monthly statements that were
12 coming in, starting, I believe it was March of 2000.

13 Q. When you looked at those statements, did
14 it suggest a discrepancy between what was reported on
15 Warnock-7 and what was most likely in the account at
16 the end of 1999?

17 MR. CHARME: I object to the form. At
18 what point in time?

19 A. That would be my question, too. At what
20 point in time? When we did this report, no, we had
21 not even looked at those pages at all.

22 Q. My question is had you looked at the
23 March statement and February statement from 2000,
24 would that have set off any kind of bells or whistles
25 or alarms in anybody's head concerning the accuracy of

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1 the report which was ultimately filed in October of
2 2000?

3 MR. CHARME: I object to the form.

4 A. Well, for one thing, the statements would
5 have been in 2000, in our file for the year 2000,
6 which is how we keep our filing, so we would not have
7 even looked in that file when we were preparing the
8 1999 5500 forms.

9 Q. How about when you were preparing the
10 2000 5500 report, would you have that information
11 available to you then?

12 A. It was then in there, and it just was
13 overlooked. We did not even realize they were in the
14 file.

15 Q. If somebody had looked at it, would that
16 have, at a minimum, set off an inquiry as to a
17 possible discrepancy between the 1999 filing and the
18 true amount in the account?

19 A. Had it been looked at, yes, it would have
20 raised a question.

21 Q. When you started getting these
22 statements, did anyone inquire as to why you were
23 getting them or why you hadn't gotten them in the
24 past?

25 A. No, the statements come in from Morgan

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1 Stanley, there's a stack of them that come in like
2 this for each month for each participant, and they
3 just get filed away. The reason we knew they were
4 getting these statements, they were coming in, because
5 they were getting, they had just set up these separate
6 accounts for the new employees, that's why we were
7 getting statements. We saw them come in, that's good,
8 we're getting them. No one looked at them.

9 Q. But you also got them for the commingled
10 account?

11 A. We did get them. We didn't know we were
12 getting them for the commingled account, but yes, we
13 did get them.

14 Q. Nobody was hiding them from anybody?

15 MR. CHARME: I object to the form.

16 A. They came to us.

17 Q. Let me put it to you this way: You had
18 all of the information you needed in your file by, at
19 the earliest, March of 2000, and certainly by the
20 beginning of 2001, had somebody looked, to realize
21 that there was probably an error or some discrepancy
22 in that 1999 5500 filing, correct?

23 A. Had we looked at the statement, the
24 December 31st, 2000 statement, then we would have, we
25 would have realized it was a mistake. We didn't look

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1 at it. We never received them before, thought we were
2 only getting the new ones. Sounds easy to say, gee,
3 how did you miss that. We did. We have a
4 participant's report, we went through, here's the
5 guy's name, check, check, never even noticed there was
6 a pile of papers this thick, but, yes, had we looked
7 at it, had we realized it was in there, we had an
8 extra statement in there and that that was it, it
9 would have raised a question.

10 Q. The note on Warnock-7 is attached to the
11 statement from Morgan Stanley. Do you know which
12 statement that was?

13 MR. CHARME: Did you mean 17?

14 MR. KERN: Is this 17?

15 MR. CHARME: This is 7.

16 (There is a discussion off the record.)

17 Q. Look at Warnock-17.

18 A. Okay.

19 Q. You got it?

20 A. Yes.

21 Q. Do you know what statement that was, that
22 note was attached to?

23 A. That's the December 31st, 2000 statement,
24 we received that in January of 2001.

25 Q. Before filing the 2000 5500, correct?

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1 A. Yes.
 2 Q. And before filing the annual, before
 3 preparing the annual reports, correct?
 4 A. For 2000, yes.
 5 Q. Is this your handwriting?
 6 A. That's my handwriting.
 7 Q. You say how could we miss that, correct?
 8 A. Yeah.
 9 Q. Why did you write "how could we miss
 10 this"?
 11 A. How could we miss this. Dr. Casella
 12 found this in the file, and I said to Dominique, how
 13 did we miss this.
 14 Q. This was an important document?
 15 A. Well, if we had found it, as your
 16 questions previously were, it would have certainly set
 17 off an alarm, yes.
 18 Q. And whatever issues we're dealing with
 19 today could possibly have been addressed and resolved
 20 at that time?
 21 MR. CHARME: I object to the form.
 22 A. I certainly would have asked what's this,
 23 you know.
 24 Q. And I take it if you couldn't get
 25 adequate or reasonable answers to your questions that

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1 you would have raised in 2000, had you not missed this
 2 document, you would have taken steps to let
 3 appropriate people know that there was a problem,
 4 correct?
 5 A. If we were off seven million dollars,
 6 yes. We wouldn't have just said, well, I guess that's
 7 4,000 that went in by accident, yes. We're talking
 8 about a difference.
 9 Q. What would you have done, if you --
 10 A. Well, I would have first -- well, I would
 11 have asked Mario what's this. That's what I would
 12 have done.
 13 Q. And if you couldn't get adequate,
 14 responsible responses, what would you have done?
 15 A. If he had said mind your own business,
 16 then I think I would have -- well, I'm sure I would
 17 have gone to Dr. Casella and said something to him.
 18 Q. Certainly, by this point in time, you had
 19 all the information you needed had you looked at it to
 20 initiate an inquiry in an attempt to resolve the
 21 discrepancy between the information you received as to
 22 the 1999 year end balance and the monies in the Morgan
 23 Stanley account, correct?
 24 A. If we had noticed this, we probably would
 25 have raised the question.

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1 Q. Probably --
 2 A. Well, we would have, but unless we were
 3 examining each statement, we wouldn't have asked the
 4 question on January 1st, 2001, but when we were doing
 5 the annual report, which would probably have been
 6 October, 2001, at that point, we would have said
 7 something is wrong here and we would have raised the
 8 question, yes.
 9 Q. No question about that, correct?
 10 A. There's no question about that. We would
 11 definitely have raised the question.
 12 Q. Are you aware of any efforts by Dr.
 13 Criscito to keep you from becoming aware of the
 14 information on the statements that you received on the
 15 commingled -- received from Morgan Stanley concerning
 16 the commingled account?
 17 A. I don't think it was his intention that
 18 we receive these, but I don't know that. They did
 19 stop coming. They didn't continue to come.
 20 Q. But they came for a while, correct, for
 21 about a year?
 22 A. They came for about a year, and I think
 23 -- I would have to check the file, but I have a
 24 feeling that's the last one we got.
 25 Q. When they stopped coming, did you inquire

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1 as to why?
 2 A. We didn't even know they were in there
 3 until Dr. Casella found them. So there was a one year
 4 window to find them in doing that 2000 report. If it
 5 wasn't found in that year, we wouldn't have found
 6 them.
 7 Q. To your knowledge, did Dr. Criscito ever
 8 advise Morgan Stanley that they were not to send you
 9 these reports?
 10 A. Somebody told Morgan Stanley to stop
 11 sending them. I don't know who.
 12 Q. Well, during the year you got them, were
 13 they sent contrary to the direction from Dr. Criscito,
 14 as far as you know?
 15 A. Morgan Stanley was supposed to send us
 16 all the new separated accounts for all the
 17 participants. That's what they were supposed to send
 18 us. Whether Dr. Criscito told them to send us this or
 19 not, you would have to ask Morgan Stanley that.
 20 Q. Okay. Let's play with some nomenclature
 21 for a while.
 22 By the middle of 2000, as I understand
 23 it, all of the monies belonging to participants other
 24 than Dr. Criscito were supposed to be out of this
 25 commingled account, correct?

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1 answered.

2 A. No, that -- the contribution receivable,
3 yes, that came from us.

4 MR. KERN: We're going to need to stop
5 now and have to come back.

6 (There is a discussion off the record.)

7 (At 3:45 p.m., the deposition is
8 adjourned.)

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CERTIFICATION

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5 I, NANCY A. MIANI, a Certified Court Reporter
6 and a Notary Public, License No. XI00814, do hereby
7 certify that the foregoing witness, BRIAN WARNOCK, was
8 duly sworn by me on the date indicated, and that the
9 foregoing is a true and accurate transcription of my
10 stenographic notes.

11 I further certify that I am not employed by
12 nor related to any party to this action.

13

14

15

16 NANCY A. MIANI, C.S.R.
17 LICENSE NO. XI00814

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